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IN THE

Supreme Court of the United States

No. 246

MICHAEL VETERE,

Petitioner,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, *et al.*; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondent James E. Allen, Jr., as Commissioner of Education of the State of New York respectfully prays that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

Opinions Below

The decision of the New York State Court of Appeals is reported in 15 N. Y. 2d 259, 206 N. E. 2d 174, and is

reprinted in Appendix A at pages 19-38 of the Petition for Certiorari. The majority opinion is printed therein at page 27 and the dissenting opinions at pages 29 and 33. The judgment is printed in said petition in Appendix B at page 39. The opinion of the Appellate Division, Third Department is reported in 21 A. D. 2d 561, 251 N. Y. S. 2d 480 and appears at page 12 of the Record of the Court of Appeals. The opinion of the Supreme Court, County of Albany is reported in 41 Misc. 2d 200, 245 N. Y. S. 2d 682 and appears in the record on appeal to the Court of Appeals at page 38.

Jurisdiction

The asserted basis of jurisdiction is an alleged deprivation of petitioner's rights, privileges and immunities under the 14th Amendment of the United States Constitution and 42 U. S. Code Sections 2000c, *et seq.*

Question Presented

Has petitioner been deprived of the equal protection of the law or of liberty without due process of the law by a decision of the Commissioner of Education directing a school district to eliminate the educational disadvantages resulting from *de facto* segregation by centralizing the elementary grades?

Statutes Involved

U. S. Constitution, Amendment XIV.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. Code Section 2000c (Civil Rights Act of 1964, Section 401)

"As used in this title—

(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

New York State

Education Law Section 310

Any person conceiving himself aggrieved may appeal or petition to the Commissioner of Education who is hereby authorized and required to examine and decide the same.

Statement

In November, 1962, the Commissioner of Education, hereinafter referred to as the Commissioner, acting under the authority conferred in him by Section 310 of the Educational Law, heard an appeal brought by parents of children attending elementary schools in the respondent school district from the refusal of the Board of Education of said district to take action to alleviate racial imbalance therein. The Commissioner referred the matter to a three man advisory committee for an exhaustive study of the situation. After receiving their report, the Commissioner rendered his decision, which appears at page 73 of the Record, in which he held that although there was no evidence of deliberate segregation, nevertheless racial imbalance did exist in the respondent district, and the existence of such imbalance was detrimental to the education of the children affected thereby. Accordingly, the Commissioner ordered

the Board of Education to adopt a plan which would eliminate the educational disadvantages and alleviate the racial imbalance. This plan carefully avoided the more questionable elements present in some other plans. Pupils in previously existing classes are not to be split up and sent to different schools in order to conform to an arbitrary racial quota, and no additional transportation is required. Groups of children of one race are not being moved into a distant school serving a neighborhood of children of another race. The unique facts in this school district made it possible to avoid any form of segregation by centralizing grades four and five in one school and by centralizing kindergarten and grades one through three in two schools, instead of dividing all of these grades among the three elementary schools. Under this plan each pupil, regardless of race, is sent to the school serving his grade, and the racial balance will be determined by the racial population of the whole district.

An application by the Board of Education for a reopening of the appeal was denied by the Commissioner. This action was then commenced by the petitioners-appellants who were parents of white children in the district. The Supreme Court of the State of New York, County of Albany, reversed the Commissioner's decision upon the grounds that Section 3201 of the Education Law of the State of New York providing that "no person shall be refused admission into or be excluded from any public school in the State of New York on account of race, creed, color or national origin" prevented any action by the Commissioner of Education assigning pupils to schools because of their race, and that such assignment was illegal whether intended to promote segregation or to alleviate it.

Upon appeal by the Commissioner to the Appellate Division, Third Department, State of New York, the decision

of the Supreme Court was reversed. The petitioners-appellants thereupon affirmed the decision of the Commissioner and of the Appellate Division by a vote of five to two.

The opinion of the Court of Appeals settled the question of the application of Section 3201 of the Education Law and determined that under New York State Law the Commissioner had the power in the proceeding brought before him to order the respondent Board of Education to accept this particular plan of pupil assignment.

The essential question at this time is whether or not this particular plan of pupil assignments violates the Federal Constitutional rights of the petitioners-appellants. We contend that this is not a substantial Federal question and that there is no conflict in the existing law on the point.

ARGUMENT

I

There is no substantial Federal question.

Although problems of racial imbalance or *de facto* segregation have arisen in a number of cases which presented serious constitutional questions, there are no such questions involved in this case. The order appealed from concerns one school district with a unique factual situation, in which the Commissioner has, in effect, centralized the elementary schools, in order to eliminate the educational consequences of one predominately Negro school. The Commissioner's action was based not on the Federal Constitution or Federal law, but on State law, and has been upheld by the highest State court.

The petitioners-appellants argue that any action by a State which takes into account the race of a pupil in de-

termining assignments to schools is unconstitutional, and that it does not matter whether the purpose of the State action is to improve the educational system, or to promote segregation, or integration. This argument would refute or negate all of the progress which has been made since the decision in the *Brown* case in eliminating segregation in the public schools and indeed in any other area. This Court has recognized that segregated schools are, by their very nature, educationally inferior. It would make no difference in this respect whether the segregation was deliberate or arose as the result of residential or other factors beyond the control of the school board. *Brown* v. *Board of Education,* 347 U. S. 483; *Blocker* v. *Board of Education,* 226 F. Supp. 208, 229 F. Supp. 709, (E. D. N. Y. 1964); *Jackson* v. *Pasadena City School District,* 59 Cal. 2d 876, 382 P. 2d 878 (1963); *Barksdale* v. *Springfield School Committee,* 237 F. Supp. 543 (D. Mass. 1965). Although this court has not, as yet, decided that affirmative action is required by federal law or by the Federal Constitution to correct *de facto* segregation, no such decision is necessary in this case. To justify the granting of certiorari, petitioners must show that this particular order of the Commissioner violated their constitutional rights. The constitution does not, as petitioners argue, prohibit the consideration of racial factors. On the contrary, where such factors have been taken into account in the past, and segregation has resulted, the constitution imposes a duty on the State authorities to continue to take such factors into account and correct the situation. *Brown* v. *Board of Education, supra; Bolling* v. *Sharpe,* 347 U. S. 497. What "equal protection" of the law does mean in this respect is that children of all races be given the same educational opportunities. The children of petitioners and the children of the Negro parents in this particular school

district will be treated in exactly the same manner. No special transportation will be required, and no groups of children will be shuffled about like cards, solely to achieve a better racial balance. No racial quota is to be arbitrarily imposed. This school district is so small that the adoption of this plan, centralizing the elementary grades, solves the problem. No child has a constitutional right to attend any particular neighborhood school. *Van Blerkom* v. *Donovan,* 15 N. Y. 2d 399; *Blocker* v. *Board of Education, supra; Jackson* v. *Pasadena City School District, supra.* School districts have of necessity the right to alter patterns of pupil assignments so long as such action is reasonable, and race is one of the factors which may be taken into account. Under the circumstances, the order of the Commissioner to change the pupil assignments so as to eliminate the educational disadvantages accompanying *de facto* segregation is not unconstitutional. *Balaban* v. *Rubin,* 14 N. Y. 2d 193, cert. den. 379 U. S. 881; *Morean* v. *Board of Education,* 42 N. J. 237, 200 A. 2d 97; *Jackson* v. *Pasadena City School District, supra; Blocker* v. *Board of Education, supra; Barksdale* v. *Springfield School Committee, supra.*

II

There is no substantial conflict in the decisions of the State and Federal Courts on the issues involved in this case.

It is settled law that in New York State school districts may be required to correct *de facto* segregation. Decision appealed from, Appendix A to petition; *Balaban* v. *Rubin, supra; Van Blerkom* v. *Donovan, supra.* Whether other states may differ on this point is irrelevant, as this is a matter of State law.

Since the Commissioner's decision is based upon State law, it is not necessary to reach the question whether such action would also be required by the Federal Constitution or Federal Law, and the decisions of other courts on that issue are not relevant in this case.

Also irrelevant in this case is the definition of "desegregation" in the Civil Rights Act of 1964, 42 U. S. Code 2000c, and cited by petitioners. That definition merely states that "desegregation under that act does* * * not mean the assignment of students to public schools in order to overcome racial imbalance." This in no way indicates or implies that such action under State law is unconstitutional. *Addabbo* v. *Donovan*, 22 A. D. 2d 383 (N. Y. 2nd Dept. 1965).

III

The decision below is correct.

Although this is a brief on the jurisdictional question, I believe a few words of summation will also show that the determinations of the Commissioner and of the Court below were correct.

The laws of the State of New York, as interpreted by its highest Court, give the Commissioner the power to supervise the administration of the public school system by local boards of education. Where such a local board is remiss in an educational matter, and an appeal is brought before the Commissioner, he can order that appropriate action be taken, and his determination is "final and conclusive and not subject to review in any Court or place whatever." New York State Education Law, Section 310. The Court of Appeals has interpreted this statute to mean that the Commissioner's determination cannot be disturbed unless

it is "purely arbitrary". *Matter of Board of Education* v. *Allen*, 6 N. Y. 2d 127; *Balaban* v. *Rubin, supra.*

In this case, after an exhaustive study of the facts in this school district, the Commissioner found that *de facto* segregation existed, and that it was educationally harmful. Although petitioners and others disagree with the latter conclusion, it was in no sense arbitrary, and it represents the trend of judicial thought since this Court found segregated schools inherently unequal in the *Brown* case. Segregated schools have consistently been found to be educationally inferior whether the segregation be *de jure* or *de facto*. *Brown* v. *Board of Education, supra; Blocker* v. *Board of Education, supra; Morean* v. *Board of Education, supra; Barksdale* v. *Springfield School Committee, supra; Balaban* v. *Rubin, supra.*

Having found that the local board refused to act to remove the educational disadvantages of *de facto* segregation, the Commissioner ordered it to proceed in accordance with the attendance plan already discussed. The order and plan have been sustained by the Court of Appeals against the arguments that they were beyond the Commissioner's powers, arbitrary, and illegal. All these assertions, as well as the claims now made that they infringe the petitioner's constitutional rights, are clearly contradicted by both the facts and the law in this case. The petitioners seek to characterize this as a case in which they are denied admission to a school because of their race, and in which an arbitrary racial quota is imposed solely to achieve a desired racial mixture. The facts are very different. Under the plan adopted by the Commissioner the neighborhood school attendance zones which resulted in *de facto* segregation are replaced by more centralized attendance zones for the different grades, but the children can still walk to

school. The assignments are based on the grade pupils attend, and not on their race. The racial population of the district as a whole, and not that of just a small portion thereof, or any arbitrary quota, determines the racial population of each class.

If the harmful effects of *de facto* segregation in a public school system cannot be corrected in this manner, then the educational authorities are powerless to remedy a common failing which both they and the courts have found to be educationally harmful.

CONCLUSION

The decision sought to be appealed is based upon the fact, recognized by this Court since the *Brown* case, that segregated schools are inherently unequal, and on the broad general powers of the Commissioner of Education granted by the laws of the State of New York. Having found that the schools in this particular school district were in fact segregated, as a result of residential patterns, the Commissioner ordered the school district to adopt a reasonable plan to correct the situation. Neither the requirement of the State of New York that *de facto* segregation or racial imbalance be eliminated in this school district, nor the facts of the particular plan by which this is to be done raise any substantial federal question.

For all of the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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